STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of CHRISTIAN ALLEN WEBER, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

LARRY HEIER,

Appellant,

and

DEBORAH ANN WEBER and ROBERT RIVARD,

Respondents.

FOR PUBLICATION
November 1, 2002
9:10 a.m.

No. 235731
Macomb Circuit Court
Family Division
LC No. 92-036958-NA

Updated Copy
January 31, 2003

Before: Fitzgerald, P.J., and Bandstra and Gage, JJ.

FITZGERALD, P.J. (*dissenting*).

Although I am sympathetic to the majority's concern that appellant did not have the opportunity to establish standing, I respectfully dissent from the majority's conclusion that appellant has standing to intervene in this matter under the law as it currently exists.

Appellant Larry Heier claims to be the biological father of the minor child in this matter. In November 2000, the trial court terminated the parental rights of Deborah Weber and Robert Rivard to the child. Weber was married to Rivard at the time of the child's conception and birth. After the trial court terminated Weber's and Rivard's parental rights to the minor child and two other children, Weber appealed to this Court. This Court affirmed the trial court's decision.[1]

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[1] *In re Weber*, unpublished memorandum opinion of the Court of Appeals, issued October 26, 2001 (Docket No. 232206).

Rivard did not appeal the trial court's decision terminating his parental rights to the three children.

In the meantime, in January 2001, appellant filed a motion to intervene, claiming that he was the child's biological father and that the trial court failed to provide him with proper notice of the proceedings. On April 26, 2001, the trial court issued an order denying appellant's motion to intervene on the basis that he lacked standing to intervene because the child already had a legal father. This appeal followed.[2]

On appeal, appellant argues that the trial court erred by denying his motion to intervene on the basis that he lacked standing. Whether a party has standing to bring an action involves a question of law that is reviewed de novo. *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 734; 629 NW2d 900 (2001). Constitutional questions are also reviewed de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997).

I. Standing

Appellant attempted to intervene after the trial court had already terminated the parental rights of Weber and her husband, Rivard. Although there was some testimony in the record supporting appellant's claim that he might be the child's biological father, the trial court held that appellant lacked standing because the child already had a legal father as a result of the marriage between Weber and Rivard.

Standing to pursue relief under the Paternity Act is conferred on (1) the mother of a child born out of wedlock, (2) the father of a child born out of wedlock, or (3) the Family Independence Agency on behalf of a child born out of wedlock who is being supported in whole or in part by public assistance. MCL 722.714(1), (8). A child is considered to be born out of wedlock if the mother was unmarried from the child's conception to its birth, or if the child is one that "the court has determined to be a child born or conceived during a marriage but not the issue of that marriage." MCL 722.711(a). The Supreme Court has interpreted this language to mean that there must be a prior circuit court "determination that the child was not the issue of the *marriage at the time of filing the complaint.*" *Girard v Wagenmaker*, 437 Mich 231, 242-243; 470 NW2d 372 (1991) (emphasis in original). The clear language of the statute requires a finding in this case that the child was not born out of wedlock. *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001) (if the statute's language is clear and unambiguous, then we assume that the Legislature intended its plain meeting and the statute is enforced as written).

The record is unclear whether appellant is the biological father of the minor child. However, it is undisputed that the child's mother was married to Rivard at the time of the minor child's conception and birth. Absent an adjudication by a court of competent jurisdiction that the

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[2] Appellant filed a claim of appeal with this Court in Docket No. 234321 from the trial court's order denying his motion to intervene. That appeal was dismissed on June 13, 2001, for lack of jurisdiction because the trial court's order denying the motion to intervene was not a final order appealable by right. Appellant then filed a delayed application for leave to appeal, which was granted on September 12, 2001.

minor child was a "child born or conceived during a marriage but not the issue of that marriage," for purposes of the Paternity Act, appellant, as the purported biological father, lacked the requisite standing to establish his paternity. See *McHone v Sosnowski*, 239 Mich App 674; 609 NW2d 844 (2000) (holding that the biological father did not have standing to pursue an order of filiation when there was no prior judicial determination that the child was not the issue of the marriage).

Appellant contends, however, that there is a distinction between actions under the Paternity Act and child protective proceedings with regard to when paternity can be established. In this regard, appellant argues that the court rules applicable to child protective proceedings provide that paternity can be established while an action is pending. However, even assuming that appellant's principle of law is sound, the record reveals that appellant failed to come forward, either before this action was commenced or before the court terminated the parental rights of the mother and legal father, to attempt to establish his paternity. Hence, appellant's argument is without merit. Thus, I would conclude that the trial court did not err in ruling that appellant lacked standing to challenge the court's decision to place the minor child for adoption. Again, I am sympathetic to the position of the majority, but being confined by the law as it currently exists, I would recommend that the Legislature revisit this issue.

II. Due Process

Appellant argues that the Paternity Act's stringent standing requirements deprived him of a recognized liberty interest without due process of law. In support of this argument, appellant relies on *Hauser v Reilly*, 212 Mich App 184; 536 NW2d 865 (1995). In *Hauser*, the plaintiff argued that the Paternity Act, by precluding him from obtaining standing, deprived him of his right to due process. *Hauser, supra* at 187. This Court adopted Justice Brennan's dissenting view in *Michael H v Gerald D*, 491 US 110, 142-143; 109 S Ct 2333; 105 L Ed 2d 91 (1989), inasmuch as this Court held that a putative father's liberty interest derives "from the father's biological link with his child, combined with a substantial parent-child relationship." *Hauser, supra* at 187-188. This Court further found that because the plaintiff did not have an established relationship with his child, he was not denied his right to due process. *Id*. at 188-189. This Court noted that the plaintiff had "never had legal custody of the child and has never shouldered any responsibility with respect to the daily supervision, education, protection, or care of the child." *Id*. at 190. Because the Court in *Hauser* found no parenting relationship of any kind to exist between the plaintiff and the child, an analysis of a liberty interest based on a substantial parent-child relationship was not essential to the outcome of the case. "'Statements concerning a principle of law not essential to [a] determination of the case are obiter dictum and lack the force of an adjudication.'" *Gallagher v Keefe*, 232 Mich App 363, 374; 591 NW2d 297 (1998) (citation omitted). Nonetheless, even if *Hauser* were followed and the test discussed by Justice Brennan applied, appellant cannot show that he was denied his right to due process.

The record does not establish that appellant had a substantial relationship with the minor child as a parent. In his dissent, Justice Brennan defined a substantial parent-child relationship as, "[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child.'" *Michael H, supra* at 143, quoting *Lehr v Robertson*, 463 US 248, 261; 103 S Ct 2985; 77 L Ed 2d 614 (1983), and *Caban v Mohammed*, 441 US 380, 392; 99 S Ct 1760; 60 L Ed 2d 297 (1979). There is no

record support that appellant had a relationship with the minor child that could be defined as substantial or to the point that appellant was actively fulfilling his role as a parent. There are indications that he visited and played with all three children on a regular basis when they lived with Weber and that he provided some support. However, it is troubling that, although appellant claimed to be aware that the child was in foster care and had been removed from Weber's custody, he did nothing more than possibly visit with the child at the foster parent's home a few times. He did not even immediately come forward when Weber's parental rights were terminated. The record does not support a finding that there was a substantial child-parent relationship in this case.

III. Notice

Appellant further argues that he was not provided with proper notice of these proceedings, either at the time of the initial petition or when the trial court heard the petition to terminate the parents' rights. Because I would conclude that appellant lacked standing to intervene, I would also conclude that this issue need not be addressed.

I would affirm.

/s/ E. Thomas Fitzgerald